

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

KEYSTONE BARGE SERVICES, INC.,
a subsidiary of KEYSTONE
SHIPPING CO., INC.

Employer

and

Case 4–RC–20037

DISTRICT 1 – PACIFIC COAST
DISTRICT, MARINE ENGINEERS’
BENEFICIAL ASSOCIATION, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION

On September 22, 2000, the undersigned issued a Decision and Direction of Election (herein called the DDE) finding, inter alia, that Chief Mates and Second Mates employed on the Employer’s tug barge vessels are not supervisors within the meaning of the Act and directing an election in the petitioned-for unit. The Employer filed a timely Request for Review. The Board granted review, and the ballots cast in the election were impounded.¹ On June 27, 2001, the Board remanded this matter to the undersigned for further consideration and to reopen the record, “on the issue of whether the Employer’s Chief Mates and Second Mates ‘assign’ and ‘responsibly direct,’ and on the scope or degree of ‘independent judgment’ used in the exercise of such authority,” in light of the Supreme Court’s decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), which issued after the DDE. The Board further requested that the parties and the undersigned consider two recent circuit court decisions, *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001) and *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000) denying enforcement of Board decisions. Pursuant to the remand order, a hearing was conducted, and both sides presented evidence and subsequently filed briefs.

As described in the DDE, the Employer operates three tug/barge vessels in the Gulf of Mexico and the Atlantic Ocean.² These vessels primarily carry paraxylene, a

¹ The election was conducted by mail ballot during the period of October 20, 2000 through December 10, 2000.

² The vessels involved in this petition are called the *Atlanta Bay/Virginia Bay*, *Tallahassee Bay/Florida Bay* and *Columbia Bay/South Carolina Bay*. The Employer also operates another vessel.

flammable and toxic petro-chemical product. The vessels are about 550 feet long and 84 feet wide and have a capacity of 180,000 barrels (7,000,000 gallons). The vessels travel between ports where they load and unload the cargo. A typical voyage may cover 1325 miles and last five-and-a-half days. Each vessel is staffed by a nine-person crew that includes the Captain, the Chief Mate, the Second Mate, the Chief Engineer, two Assistant Engineers and three Able-Bodied Seamen (herein called ABs). For each vessel there are two crews that alternate every 35 days. The United States Coast Guard requires that the Captain, Chief Mate and Second Mate all hold specified maritime licenses.

All ship personnel, including the Captain, are expected to follow the Keystone Shipping Company Operating Procedures Manual and Tug/Barge Supplement (herein referred to collectively as the KOPM). These documents set forth the Employer's general rules and procedures for handling the vessel's day-to-day operations. The Captain is permitted to deviate from the KOPM if a governmental regulation takes precedence or for reasons of safety, customer service, or pollution prevention. When the Captain deviates from the KOPM, he is expected to speak to the Fleet Administrator.

The Captain is in charge of the ship's overall operations. The KOPM states that the Captain shall "exercise full control over and have responsibility for the proper manning, safe operation and efficient management of the vessel," and that officers and crew members assigned to the vessel are subject to the Captain's orders. The Chief Mate is responsible for the administration and supervision of the Deck Department, which includes the Second Mate and the three ABs. The KOPM states that the Chief Mate³ shall, "serve as Deck Watch Officer in sea and in port, if so assigned by the Master," and "assign duties to the Deck Officers and unlicensed crew in port." The KOPM further states that the Chief Mate's "orders to the Deck Officers and unlicensed crew shall be considered effective and binding," and that the Chief Mate "is responsible to the Master for all matters pertaining to cargo operations." The Chief Mate is also the acting Captain in the Captain's absence. The Second Mate generally serves as the vessel's Navigational Officer and as such, he maintains the relevant charts and publications. The KOPM further states that the Second Mate may serve as the vessel's Medical Officer, Safety Officer, and Communications Officer, if so designated by the Captain. The Second Mate generally has the same responsibilities as the Chief Mate in the Chief Mate's absence.

By law, the Captain may not work more than twelve hours per day, and the Chief Mate and Second Mate are in charge of the vessel for the other twelve hours. At sea, the Captain, Chief Mate and Second Mate each stand two four-hour watches every day. While standing watch at sea, the Second Mate's responsibilities for navigation and work assignments are the same as the Chief Mate's responsibilities. When the Captain is not on watch, the Mate⁴ on watch is expected to follow the Captain's "Standing Orders," which set forth each Captain's individual rules for conducting the watch in his absence. Different Captains issue standing orders of varying levels of detail, but all of the standing orders in the record state that the watch officers should call the Captain whenever they

³ The KOPM refers to the Captain as the Master, the Chief Mate as the Chief Officer, and the Second Mate as the Junior Officer.

⁴ The term "Mate" in this Supplemental Decision refers to both the Chief Mate and the Second Mate.

are in doubt as to what to do.⁵ For night watches, the Captain issues additional “night orders” supplementing the standing orders.⁶ During their watches, the Mates are responsible for promoting the safety of the vessel, ensuring that it is on the right course, posting appropriate lookouts, and complying with all applicable regulations. The Mate on watch also directs the opening or closing of valves, and an incorrect decision could cause a major spill or mechanical failure. The Mate is in charge of calling crews out for overtime, rigging the pilot ladder, maintaining a bow watch, and setting out fire gear. An AB is assigned to work with a Mate on watch. During daylight hours, the Mate may require the AB to perform necessary maintenance tasks or serve as a lookout, while at night the AB always serves as a lookout. The Mate may also direct the AB to make rounds, respond to alarms, and check navigational lights. On night shifts, each hour the AB makes regular rounds to inspect specified areas of the vessel, but the Mate can instruct the AB to deviate from these rounds in certain situations. For example, in inclement weather the Mate may instruct the AB to avoid certain areas, and in cold weather the Mate may instruct the AB to check the cargo heaters.⁷ If the Mate notices a problem with the vessel, he may instruct the AB to inspect the relevant area. The Mate has authority, without first consulting the Captain, to change course or reduce speed to avoid traffic or collisions. The Mate must contact the Captain, however, in the event of an emergency. The KOPM requires that the Mate contact the Captain when visibility is restricted and have the Captain take charge of the vessel. The Mate must report abnormal weather changes to the Captain, and he must notify the Chief Engineer and the Captain when the air temperature drops below 35°F so that they can take necessary precautions to prevent freezing damage to equipment, machinery and pipelines.

In addition to standing watch, the Chief Mate performs navigational tasks and is in charge of deck maintenance and loading and unloading operations. The vessel’s overall maintenance schedule is set forth in the KOPM, but the Chief Mate determines which of the ABs and Engineers should perform the tasks set forth in this schedule, such as chipping, painting or valve greasing, among others. The Chief Mate meets with the crew in the morning, instructs each individual what task to perform in what time frame, and provides detailed instructions as to how to perform the work. For example, for a painting job the Chief Mate may explain specifically how he wants the area prepared, primed and coated. When the AB completes the task, the Chief Mate carefully inspects the work. Improper maintenance can cause serious problems to the vessel because of the corrosive effect of seawater. ABs are required to follow the Chief Mate’s instructions, and the Employer terminated an AB last year for refusing to do so. If the Second Mate needs a maintenance job to be completed, he asks the Chief Mate to assign an AB to

⁵ The *Tallahassee Bay/Florida Bay* standing orders state, “**CALL THE CAPTAIN IMMEDIATELY IF IN DOUBT**” (Emphasis in original). The *Columbia Bay/South Carolina Bay* standing orders list eleven different circumstances requiring the Mate to call the Captain, including “whenever in doubt as to any navigational or operational occurrence that may adversely affect the unit.” The *Atlanta Bay/Virginia Bay* standing orders state simply, “Call the Master anytime in doubt.”

⁶ The Chief Mate can deviate from the night orders in unusual situations. For example, if the Chief Mate spots another vessel in distress on the horizon, he may summon other employees to assist in dealing with the problem.

⁷ Because of the unpredictability of winter weather, the Second Mate may instruct the AB to deviate from his rounds as often as every four days during that season, while at other times there may be no deviations.

perform the work. Thereafter, the Second Mate may inspect the work and assign the AB to redo it if necessary. The Chief Mate also instructs a separate crew of three individuals who come on board each summer to sandblast the vessel.⁸

Either the Chief Mate or the Second Mate stands watch while the employees tie the vessel to the dock. The Mate on watch provides specific instructions to two ABs and an Engineer in pulling the lines in and out to secure the vessel, based on the requirements of the particular dock. Thus, he may instruct the other employees to pull in, tighten and slacken particular lines in turn. The tying-up process is dangerous and can cause serious injuries to employees if performed improperly. The KOPM governs the number of lines to be used in tying up the vessel and indicates the specific fittings to which to tie the lines.

While in port during cargo loading or unloading operations, the Captain stands day watch for 12 hours, while the Chief Mate and the Second Mate alternate six-hour watches. The Chief Mate is in charge of loading and unloading cargo and tank cleaning and preparation. The Chief Mate designs the cargo loading plan, which sets forth the general sequence of the process, including the amounts of cargo to load and in which of the vessel's 12 tanks to load it. Additionally, during docking and undocking operations, the Chief Mate delegates the tasks of setting up the equipment, readying tugboats, preparing mooring lines and hoses, and testing valves. When the Chief Mate is unavailable, the Second Mate is in charge of the Deck Department and runs the loading and unloading operations pursuant to the Chief Mate's cargo orders. When standing cargo watch, the Mate gives direction to the three ABs and the Assistant Engineer. During loading and unloading operations, the Mate first directs the ABs in connecting the hoses, an activity that is fairly routine.⁹ The Engineer then discharges the cargo from the vessel with the pump, following the Mate's instructions for when to start the pump and what oxygen content to use. Once the hoses are connected, one of the ABs normally goes off watch, and the Mate and/or the other AB line up the valves to receive the cargo. If there is considerable physical labor involved in the valve work, the Mate can independently instruct a second AB to stay and assist with it, which often results in the second AB working overtime.¹⁰ When loading cargo, the Mate can assign particular tasks to whichever AB is better suited to perform them. For example, he can assign a more experienced AB rather than a newer employee to operate a crane. The cargo order specifies where to load the products, as well as the loading order of the tanks. No two cargo loads are identical, and the sequence of loading or unloading varies with each voyage. Loading in an incorrect order may result in a weight imbalance, which could damage the vessel. Portions of the same load may go to different ports, and the Mate must ensure that all cargo goes to the proper destination. The Chief Mate and Second Mate have the authority to direct the crew to cease operations when they believe that the handling of cargo would be unsafe because of adverse weather conditions such as lightning or high winds. The Captain is generally available for consultation during the

⁸ The record does not indicate whether these individuals are employees of the Employer.

⁹ At the hearing, a Second Mate characterized this process as "straightforward . . . not rocket science."

¹⁰ As noted in the DDE, assignment of overtime work is limited by legal restrictions on the number of hours that employees can work in a given time period.

loading and unloading process. In emergencies, such as chemical spills, collisions, or casualties, the Captain remains on the bridge, while the Chief Mate, who is in contact with the Captain, directs the rest of the crew in dealing with the situation. Second Mates adjust the cargo plan as circumstances dictate, and the Captain of the *Atlanta Bay* testified that they deviate from the cargo plan about two or three times per load.

The KOPM and related documents include detailed instructions as to how to perform mooring and loading operations. For example, a five-page document entitled “Oil Transfer Procedures” for the *Florida Bay* indicates which personnel should be on duty, how the vessel is moored, what equipment is needed, and how to handle emergencies, among other things. Additionally, prior to loading or discharging cargo, the vessel’s officers must complete a “Declaration of Inspection” checklist concerning numerous detailed safety requirements set forth in the Code of Federal Regulations. The KOPM sets forth the Mate’s responsibilities to ensure that ABs make hourly rounds to check various items and pass along specified safety information from the dock. The KOPM specifies the maximum allowable oxygen content, the maximum level of product for each tank, the number of employees who must be present during the process of “topping off” the tanks, and procedures to follow in the event of a variance. If there is an unusual accident such as a hazardous waste spill, the Mate can call in a third AB to assist without consulting the Captain. The KOPM indicates that in the event of a cargo spill into the water, another set of procedures, the “Vessel Response Plan,” must be followed. In hazardous weather conditions, the Mate can instruct the other employees to stop the loading or unloading process.

In addition to the KOPM, the Mates’ performance of their duties is governed by detailed Coast Guard regulations. These regulations specify the equipment inspections and other tasks to be performed before loading or unloading cargo, and the Mates are not authorized to deviate from them. The Mates also follow the procedures listed in the “International Safety Guide to Tankers and Terminals.” This book makes recommendations as to the handling of crude oil and petroleum products and sets forth guidelines and safety suggestions for various processes including cargo loading and mooring at terminals. These guidelines are far less detailed than the procedures set forth in the KOPM.

When the Second Mate acts as the vessel’s Training Officer, he may direct other employees, based on their knowledge and experience, to give training sessions to the rest of the crew. ABs earn about \$40,000 per year, Second Mates earn about \$60,000 a year, and Chief Mates earn about \$72,000 a year.

A finding of supervisory status is warranted only where the individual in question possesses one or more of the indicia set forth in Section 2(11) of the Act. *The Door*, 297 NLRB 601 (1990). The statutory criteria are read in the disjunctive and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise “independent judgment” in the performance of supervisory functions and who act in the interest of the employer. *NLRB*

v. Health Care & Retirement Corp., 511 U.S. 571 (1994). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Id.*; *Juniper Industries*, supra, 311 NLRB at 110. The authority “effectively to recommend” an action listed in Section 2(11) means that the recommended action is taken with *no* independent investigation by an individual’s superiors, not simply that the recommendation ultimately is followed.” *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982) (emphasis in original). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), *enfd.* 961 F.2d 1578, 140 LRRM 2120 (6th Cir. 1992). Job descriptions or job titles suggesting the presence of supervisory authority are not given controlling weight. Rather, the Board insists on evidence supporting a finding of actual as opposed to mere paper authority. *East Village Nursing Center v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999); *Store Employees Local 347 v. NLRB*, 422 F.2d 685 (D.C. Cir. 1969); *NLRB v. Security Guard Services*, 384 F.2d 143 (5th Cir. 1969), *enfg.* 154 NLRB 8 (1965); *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

In finding that the Employer’s Chief Mates and Second Mates did not use independent judgment in assigning and directing the work of ABs,¹¹ the DDE relied primarily on the Board’s decisions in *Chevron Shipping Co.*, 317 NLRB 379 (1995) and *Spentonbush/Red Star Cos.*, 319 NLRB 988 (1995), *enf. denied* 104 F. 3rd 484 (2nd Cir. 1997). In *Chevron Shipping*, the Board found that Second Mates and Third Mates on the employer’s steam tankers were not supervisors.¹² The DDE indicated that the Board found that the Second Mates’ and Third Mates’ discretion when serving as watch officers was severely restricted by the masters’ standing orders that required them, *inter alia*, to summon the master in the event of any emergency or doubtful situation, and to notify him after making decisions such as changing the speed of the vessel. The DDE also noted that in *Chevron Shipping*, the Board found that the officers at issue did not use independent discretion in directing the crew in loading and unloading cargo. The DDE further relied on *Chevron Shipping*’s finding that the authority to direct the work of the crew was “based on their greater technical expertise and experience.” With respect to *Spentonbush*, the DDE noted the Board’s finding that the ship’s maintenance work was routinely scheduled and did not require any particular direction, and the direction of the crew in loading and unloading operations, which included the determination of “which

¹¹ In finding that the Employer’s Chief Mates and First Mates are not supervisors, the DDE rejected the Employer’s contentions that the Mates had the authority to recommend hiring, apportion overtime, discipline and effectively recommend discipline, and prepare performance evaluations. These findings are unaffected by *Kentucky River*, which dealt only with the Section 2(11) factors of assignment and responsible direction of work.

¹² In that case, the Second Mates’ and Third Mates’ authority as watch officers was similar to the Chief Mates’ and Second Mates’ authority herein because that ship employed a far larger crew, consisting of a Captain, a Chief Engineer, a First Mate, two Second Mates and Third Mates, three Assistant Engineers, and at least twelve other employees. The parties in *Chevron Shipping* stipulated that the First Mates were supervisors.

compartments are to be filled, which valves opened and closed, and in which order,” did not involve independent judgment.¹³

In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), the Court decided, contrary to the Board, that registered nurses at a residential care facility were supervisors within the meaning of the Act. In determining that the nurses were not supervisors, the Board had found, *inter alia*, that while the nurses directed the work of nurses aides, this direction did not involve independent judgment because it was by virtue of the nurses’ training and experience, not because of their connection with management. The Court upheld the Board’s longstanding rule that the burden of proving Section 2(11) supervisory status rests with the party asserting it. However, the Court rejected the Board’s interpretation of “independent judgment” in Section 2(11), finding that the Board erroneously excluded “ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards” from the statutory definition of independent judgment.

The Court did not hold, however, that every exercise of professional or technical judgment in directing other employees is necessarily an exercise of independent judgment, but recognized that the Board could determine the degree of independent judgment necessary to meet the statutory threshold for supervisory status. In this regard, the Court indicated, that, “the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.” As an example of this type of situation, the Court cited *Chevron Shipping*. In particular, the Court quoted the Board’s conclusion in *Chevron Shipping* that, ‘although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master’s standing orders, and the Operating Regulations, which require the watch officer to contact a superior officer when anything unusual occurs or when problems occur.’¹⁴ The Court also suggested that the Board could offer a limiting interpretation of responsible direction by distinguishing employees who direct the manner of others’ performance of discrete *tasks* from employees who direct other *employees* . . .” (Emphasis in original).¹⁵

¹³ Similar to the instant case, the vessels in *Spentonbush/Red Star* carried cargo that posed the risk of environmental damage if spilled.

¹⁴ *Kentucky River Community Care, Inc.*, *supra* at 1867. The Board has recently affirmed that where an alleged supervisor’s, “role in directing employees is extremely limited and circumscribed by detailed orders and regulations issued by the Employer and other standard operating procedures,” the degree of judgment exercised by the alleged supervisor “falls below the threshold required to establish statutory supervisory authority.” *Dynamic Science, Inc.*, 334 NLRB No. 57 (2001).

¹⁵ *Kentucky River Community Care, Inc.*, *supra* at 1870. The Court cited *Providence Hospital*, 320 NLRB 717, 729 (1996) as a Board decision that appeared to have drawn that distinction. In *Providence Hospital*, which involved the supervisory status of charge nurses, the Board held that, “Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee’s experience, skills, training or position, such as the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee’s ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and

Thus, although the Court rejected some of the Board's views concerning independent judgment, the Court approved the Board's reasoning in *Chevron Shipping* that the mates' direction of work was so circumscribed by the master's standing orders and the applicable regulations as to fall short of requiring independent judgment. The record in the instant case, as supplemented at the reopened hearing, indicates that the authority of the disputed officers in *Chevron Shipping* was substantially similar to the authority of the Employer's Chief Mates and Second Mates. Thus, the Second Mates and Third Mates in *Chevron Shipping*, among other things, assigned duties to their partners while serving as watch officers, called additional crew members out to work as needed, planned and oversaw the loading and unloading of cargo, and directed several deckhands in managing the lines during mooring and unmooring operations.¹⁶ In the instant case, the Employer's contention that the Mates assign and responsibly direct is likewise based on their authority to assign duties on watch, call additional crew members to work and oversee mooring and loading operations. In both cases, the mates were required to contact the captain in all unusual circumstances, and their direction of employees was closely guided by operating regulations.¹⁷ Inasmuch as the Mates' authority in this case is circumscribed in a manner similar to the mates in *Chevron Shipping*, the Court's *Kentucky River* decision does not alter the DDE's conclusion that the Employer's Mates do not use independent judgment in assigning and directing the work of the ABs.¹⁸

Additionally, the Mates herein supervise the performance of discrete *tasks* but do not direct other *employees*. Thus, the Mates instruct the ABs how to perform duties such as tying the vessel to the dock and unloading cargo, and the Mates may alter the ABs' rounds as conditions require. They also divide routine maintenance work among the ABs and oversee its performance.¹⁹ These types of direction are concerned primarily with the tasks to be performed, and any direction of the personnel is incidental to the task. See *Northern Montana Health Care*, 324 NLRB 752, 753 (1997), *enfd.* in relevant part, 178 F. 3d 1089 (9th Cir. 1999). Moreover, the contours of these tasks have been set forth in great detail in various regulations, manuals and supervisory orders, and the record fails to establish that the Mates can deviate from these orders and procedures in assigning tasks

training.” 320 NLRB at 729. Also see *KGW-TV*, 329 NLRB 378, 383 (1999) in which the Board determined that television news producers, who coordinated production activities with skilled technicians, reporters, photographers and on-air talent, were not supervisors within the meaning of the Act.

¹⁶ With respect to the mooring process, the Board noted that they instructed the deckhands, “for example, how to manage the lines, or whether to tie the ship to the tugboat.” The Board stated that the “mates’ instructions are critical as the line can get caught in the ship’s propellers if thrown at the wrong time.” *Chevron Shipping*, *supra*, 317 NLRB at 380.

¹⁷ The Board in *Chevron Shipping* distinguished *Sun Refining Co.*, 301 NLRB 642 (1991), in which Second Mates and Third Mates were found to be statutory supervisors. While *Chevron Shipping* and *Sun Refining* are factually similar with respect to the issue of responsible direction, in *Sun Refining* the Board found additional indicia of supervisory status, i.e., the authority to assign overtime based on independent judgment and a greater role in disciplining crew members.

¹⁸ This Supplemental Decision no longer relies on the finding in *Chevron Shipping* that the Mates’ “authority to direct the work of the crew was ‘based on their greater technical expertise and experience, rather than being an indication of supervisory authority.’”

Kentucky River does not affect the DDE’s reliance on *Spentonbush* in finding that the assignment and direction of maintenance tasks involves routine matters that don’t involve independent judgment.

¹⁹ In this regard see *Clark Machine Co.*, 308 NLRB 555, 556 (1992).

to the crew. I therefore conclude that the Mates do not meet the statutory criteria of “responsible direction” because they direct employees to perform discrete tasks rather than directing employees in general. Thus, having considered the impact of the Court’s *Kentucky River* decision, I find that it does not change my finding that the Employer’s Mates do not use independent judgment in assigning or directing work.

The Board has also directed the parties and the undersigned to address and consider two recent circuit court of appeals cases, *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001), and *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000). In *Brusco*, the Board concluded that the employer’s tugboat mates were not supervisors, adopting a hearing officer’s finding that the mates’ direction of crew members in various tasks did not require independent judgment.²⁰ In its decision on appeal, the court stated that the Board’s decision in *Brusco* appeared to be inconsistent with two prior Board cases, *Local 28, International Organization of Captains, Mates & Pilots (Ingram Barge Co.)*, 136 NLRB 1175 (1962), enfd. 321 F.2d 376 (D.C. Cir. 1963) and *Bernhardt Brothers Tugboat Service, Inc.*, 142 NLRB 851, enfd. 328 F.2d 757 (7th Cir. 1964), and remanded the case to the Board to explain why its decision was not inconsistent with those cases or to justify its apparent departures.²¹ In *Ingram Barge* the Board had found that an organization of masters, mates, and pilots was not a “labor organization” within the meaning of Section 2(5) of the Act because all of its members were Section 2(11) supervisors. The Trial Examiner, whose decision was affirmed by the Board, relied on several factors in establishing supervisory status, i.e., the masters, mates, and pilots were regarded as officers by the deckhands; the deckhands were required to obey the officers’ orders under penalty of discharge; the masters and pilots needed to make complex decisions concerning the safety of the boat and the crew; and the mates needed to use independent judgment in issuing orders to deckhands during locking and docking operations and in emergency situations. Although some of these types of authority are similar to the Mates’ authority in the instant case, there was no cited evidence of standing orders, procedures or regulations to guide the officers in directing the work of the crew.²² Thus, the officers’ authority in that case was not limited in the same manner as the authority of the Employer’s Chief Mates and Second Mates. An additional distinction from the instant case is that *Ingram Barge* concerned the supervisory authority of masters and pilots, as well as mates. In *Bernhardt Brothers*, in finding pilots on tow boats to be supervisors, the Board relied on the pilots’ authority to direct employees as to matters such as the assignment and placement of lookouts and the amount of power needed for the tow. Similar to *Ingram Barge*, however, there was no evidence that these decisions were restricted in any way by detailed manuals or standing orders of the type limiting the Mates’ independent discretion in the instant case. Thus,

²⁰ The hearing officer’s decision is unpublished.

²¹ The court did not set forth the facts of the *Brusco* case, which are contained in the unpublished hearing officer’s report, nor express its own views as to whether the mates used independent judgment in directing the work of employees.

The court also questioned the Board’s findings regarding the assignment of work but made no finding of its own because the employer waived the issue by failing to raise it before the Board.

²² In fact, the Trial Examiner found that when the master was relieved by the pilot in standing watch he did not leave detailed instructions concerning the navigation of the boat or other operations. *Ingram Barge*, supra, 136 NLRB at 1194.

Brusco is not dispositive of the instant case because the discretion of the officers at issue in *Ingram Barge* and *Bernhardt Brothers* was not circumscribed by standing orders or regulations.²³

In *Empress Casino*, the court denied enforcement of a Board decision that none of the captains, first mates, or chief engineers on a riverboat gambling casino ship were statutory supervisors. In its decision, the court was particularly disturbed by the Board's failure to consider the significance of the ratio of supervisors to nonsupervisory employees; the court observed that pursuant to the Board's decision, there were no supervisors aboard vessels that were staffed by crews of 150 to 200 employees. The instant case is clearly distinguishable, however, as each of the Employer's vessels is captained by statutory supervisors. In fact, if the Chief Mates and Second Mates were found to be supervisors there would be at least one supervisor for every two employees, an unusually high ratio. See *Acme Markets, Inc.* 328 NLRB 1208 (1999); *MJ Metal Products, Inc.*, 325 NLRB 240 (1997). *Empress Casino* also is distinguishable from the instant case because the court found that the captains and chief mates played major roles in personnel matters such as hiring and firing employees and evaluating them for salary increases, authority not possessed by the Employer's Mates. Moreover, in *Empress Casino*, the court contrasted the captains' authority in personnel matters, which supported its conclusion that they were supervisors, from their authority to direct employees in performing their tasks. Thus, the court stated that when the captain orders a crew member "to steer the ship to starboard to avoid an iceberg, he is exercising professional judgment rather than shouldering one of the supervisory responsibilities of the shipowner's managers."²⁴ In this sense, *Empress Casino* supports a finding that the Employer's Mates are not supervisors.

Thus, having considered the evidence adduced at the reopened hearing, as well as the Court's decision in *Kentucky River* and the circuit court of appeals' decisions in *Brusco* and *Empress Casino*, I affirm the finding in the DDE that the Employer has not carried its burden of proving that the Chief Mates and Second Mates are supervisors within the meaning of the Act.²⁵

²³ The court in *Brusco* rejected the employer's contention that mates as a category may not be considered employees.

²⁴ The court also found that the regional director made incorrect factual findings and drew inappropriate conclusions in several respects, especially concerning the officers' authority effectively to recommend hiring.

²⁵ Following the remand in the instant case, the Board issued decisions in *Ingram Barge Company*, supra, 336 NLRB No. 131 (2001) and *Alter Barge Lines, Inc.*, 336 NLRB No. 132 (2001), finding in both cases that barge pilots were supervisors. Those cases are distinguishable, however. In *Alter Barge Lines*, the Board adopted the Administrative Law Judge's finding that the barge pilots at issue were not bound by standing orders, and there was no evidence that they were restricted in their judgment by any operating regulations. The Judge specifically found the case distinguishable from *Chevron Shipping*, supra. slip op. at 6. In *Ingram Barge Lines*, there also was no evidence that the pilots' judgment was circumscribed by standing orders or operating regulations. In finding the pilots to be supervisors, the Administrative Law Judge noted that their duties had not changed since the Board's 1962 decision in *Local 28, Masters, Mates and Pilots (Ingram Barge Co.)*, 136 NLRB 1175, 1203, discussed above, in which the barge pilots of the same employer were previously found to be supervisory.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **March 26, 2002**.

Signed: March 12, 2002

at Philadelphia, PA

/s/

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

177-8560-1000

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